IP 06-0113-CR 1 T/F USA v McNeal
Magistrate Kennard P. Foster Signed on 09/05/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
MCNEAL, ANTHONY,	)	CAUSE NO. IP06-0113-CR-01-T/F
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. IP 06-113-CR-01 T/F
	)	
ANTHONY McNEAL,	)	
	)	
Defendant.	)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant is charged in a three-count Indictment returned by a federal grand jury on July 25, 2006 that charges him in count one with distribution 50 grams or more of a mixture or substance containing a detectable amount of cocaine base (crack cocaine), a Schedule II Narcotic Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A)(iii). The defendant is also charged in count two with possession with intent to distribute a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)©).

On August 21, 2006, at the initial appearance, the government filed a written motion and moved for detention pursuant to 18 U.S.C. §§3142(e), (f)(1)(B), (f)(1)©) and (f)(2)(A), on the grounds that the defendant is charged in count one with an offense for which the maximum sentence is life imprisonment, in all counts with drug trafficking offenses where a maximum

term of imprisonment of ten years or more is prescribed in the Controlled Substances Act and that, if released, there is a serious risk the defendant would flee. The detention hearing was held on August 24, 2006. The United States appeared by Barry D. Glickman, Assistant United States Attorney. Mr. McNeal appeared in person and by his appointed counsel, William E. Marsh, Federal Community Defender.

Based on the Indictment returned by the grand jury, there is probable cause to believe that the defendant committed the crimes he is charged with in the Indictment. The probable cause finding gave rise to the presumptions that there is no condition or combination of conditions which will reasonably assure the appearance of the defendant or the safety of the community. The defendant did not rebut either the presumption that he is a danger to the community or the presumption that he is a risk of flight and, consequently, was ordered detained.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendant is charged in a two-count Indictment returned by a federal grand jury on July 25, 2006 that charges him in count one with distribution 50 grams or more of a mixture or substance containing a detectable amount of cocaine base (crack cocaine), a Schedule II Narcotic Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A)(iii). The defendant is also charged in count two with possession with intent to distribute a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)©).

2. The penalty for count one in the indictment is a mandatory minimum sentence of ten years and a maximum of life imprisonment. See 21 United States Code, Section 841(b)(1)(A)(iii). The Court notes however, that on August 22, 2006, the United States filed an information pursuant to 21 United States Code Section 851 alleging the defendant's prior felony drug conviction. This results in penalty for count one of the indictment being a mandatory minimum sentence of twenty years and a maximum sentence of life imprisonment.

3. The Court takes judicial notice of the indictment in this cause. The Court further incorporates the evidence admitted during the detention hearing, as if set forth here.

4. At the detention hearing, counsel for the defendant proceeded by proffer. The defendant presented no other evidence.

5. Because an Indictment has been returned, there is probable cause for the offenses that the defendant is charged with in the indictment, and the rebuttable presumptions arise that the defendant is a serious risk of flight and a danger to the community. 18 U.S.C. § 3142(e).

6. The Court admitted a Pre-Trial Services Report (PS3) regarding defendant Anthony McNeal on the issue of his release or detention. Mr. McNeal is age 28 (DOB 8-16-77). The PS3 indicates the following:

(A) On January 16, 1997, in Marion County, Indiana, he was convicted of Resisting Law Enforcement and was sentenced to 180 days jail (2 days executed, 178 days suspended to 180 days probation). On August 6, 1997, his probation was terminated.

(B) On October 7, 1999, in Marion County, Indiana, he was convicted of Possession of Marijuana and was sentenced to 365 days jail (suspended).

©) On September 3, 1999, in Marion County, Indiana, he was convicted of Possession of Marijuana (Class D Felony). He was sentenced to 545 days jail (10 days executed, 535 days suspended to 545 days probation). On December 24, 2001, McNeal violated the terms of his probation by testing positive for cocaine and by providing a diluted urine sample. On April 19, 2002, his probation was terminated.

(D) On August 6, 2001, in Marion County, Indiana, he was convicted of Resisting Law Enforcement and sentenced to 60 days jail (executed).

(E) On June 16, 2005, in Marion County, Indiana, he was convicted of Operating a Vehicle While Intoxicated and was sentenced to 365 days jail (4 days executed, 361 days suspended to probation. On October 12, 2005, his probation was terminated.

(F) McNeal has fathered four children with four different women. He has been ordered to pay child support and is in arrears on two separate child support payments.

(G) McNeal has failed to appear for Court proceedings on at least one occasion.

(H) On August 21, 2006, the court ordered McNeal to provide a urine sample to Pre-Trial Services to screen for possible drug use. The results of the drug screen were positive for opiates.

(I) McNeal has used three different social security numbers.

7. The defendant has failed to rebut the presumption that he is a serious risk of flight, and a danger to the community and any other person. Therefore, Anthony McNeal is ORDERED DETAINED.

8. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines

whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, §3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. *See United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moves for detention pursuant to §3142(f)(1)(B), (f)(1)©), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of §3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. 18 U.S.C. §3142(e).

Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is "reasonable assurance"; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant's appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

9. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendants' appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the

defendant committed an offense under (1) the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) 18 U.S.C. § 924©); (3) 18 U.S.C. § 956(a); or (4) 18 U.S.C. § 2332b. 18 U.S.C. § 3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a § 3142(e) presumption is not such a "bursting bubble". *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case and have not been rebutted.

10. If the defendant had rebutted the presumptions, the Court would consider the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community is the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or

alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

11. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. On May 25, 2006, law enforcement agents made a controlled purchase of over 50 grams of crack cocaine from Anthony McNeal. This transaction was audio and videotaped.

b. The evidence demonstrates a strong probability of conviction.

c. The mandatory sentence of twenty years imprisonment on count one of the indictment, when coupled with Mr. McNeal's prior criminal record, history on non-compliance with the terms of Court ordered probation, and use of illicit drugs, substantially increases the seriousness of his risk for flight and illustrates the danger he presents to the community.

The Court having weighed the evidence regarding the factors found in 18 U.S.C. §3142(g), and based upon the totality of evidence set forth above, concludes that if the defendant had rebutted the presumptions in favor of detention, he nevertheless, would be detained, because he is a serious risk of flight and clearly and convincingly a danger to the community.

WHEREFORE, Anthony McNeal is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody

pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this ____ day of August, 2006.

KENNARD P. FOSTER
U.S. Magistrate Judge
Southern District of Indiana

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